STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: FEBRUARY 06, 2023

IN THE MATTER OF:
Appeal Board No. 626543

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective January 22, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by BOGOPA SERVICE CORP prior to January 22, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed October 26, 2022 (), the Administrative Law Judge granted the claimant's application to reopen A.L.J Case No. 022-20187, and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board, insofar as it sustained the initial determination disqualifying the claimant from receiving benefits, effective January 22, 2022, on the basis that the claimant lost employment through misconduct. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed part time as a service department clerk by the employer supermarket for about 4 months. The claimant's shift began at either 3:00 PM, 4:00 PM, or 6:00 PM, depending on the day of the week, and ended at 11:00 PM; he was paid $15 per hour for his work of cleaning

and picking up at the store. The claimant worked another, full-time job, from which he came directly to work at the supermarket.

The employee handbook provides, in part, that "patterned or excessive" tardiness "may result in disciplinary action up to and including termination of employment." The claimant did not receive a copy of this handbook from the employer.

On or before November 17, 2021, the claimant was late reporting to his shift. His manager (M) asked why he was late, and told the claimant any time he was going to be late he had to call the store manager to let him know. After that, the claimant was late reporting for his shift about five times. On one of these occasions, he was at the doctor's office with a suspected case of COVID-19. The other times the claimant was late getting out of his full-time job. Each time, the claimant called the store manager and advised that he was going to be late, as he had been told to do.

On January 19, 2022, the claimant was ten minutes late; on January 20, he was fifty minutes late; on January 21, the claimant was ten minutes late. When the claimant arrived for his shift on January 22, 2022, the store manager (J) called the claimant into his office and spoke to him for the first time about his tardiness record. The claimant assured J that he would talk to the manager at his other job to make sure that he did not have to work later than scheduled there. J told the claimant that it was too late, and fired him. The claimant repeated his request to have a chance to fix things; his request was denied.

OPINION: The evidence establishes that the claimant was fired because the employer was dissatisfied with his attendance; specifically with the claimant's conduct of arriving late for his shift on a number of occasions. However, the record fails to establish that the claimant knew or should have known that reporting to work ten minutes late on January 21, 2022 would result in his discharge, and therefore fails to establish misconduct by the claimant.

We are not persuaded that the claimant received a copy of the employee handbook and the employer's policy regarding absences and tardiness. The claimant's credible firsthand testimony on this issue is credited over the typed checkmark purporting to be the claimant's electronic "signature" produced to establish the claimant's receipt of the handbook. Further, even if the claimant had received and read the handbook, the general language of the

handbook alone is insufficient to provide notice to him that his tardiness on January 21 would get him fired. The Board has held that a general policy or memorandum issued to all employees is not a specific warning to a particular employee that his job is in jeopardy. See, Appeal Board No. 560266.

This record fails to establish that the claimant had received a warning that continuing tardiness would result in his discharge. The claimant's firsthand credible testimony establishes that prior to his discharge, the only time he was spoken to about tardiness was the first time he was late, around November 17, 2021, and at that time he was only told to make sure to call if he was going to be late, which the claimant thereafter did. The record is devoid of any written warning to the claimant, much less a final written warning, putting him on notice that any further incidents of tardiness would result in the termination of his employment. See, Appeal Board No. 596994.

Matter of Brown, 83 AD3d 1231 (3d Dept, 2011) and the Board decisions in Appeal Board Nos. 582970, 581691, and 574634 cited in the hearing decision, are not controlling. In each of those cases, the claimant had been given a final written warning, or had entered into a "last chance agreement" with the employer. In such situations, and in those cases, the claimant was aware that a single further infraction would lead to his discharge. Those facts are not established here. This claimant had not been specifically warned that

his tardiness was not acceptable, and was not placed on notice by the employer that a further infraction would mean the end of his employment. While an employer may fire an employee for any lawful reason, including dissatisfaction with that employee's attendance and promptness, not all such reasons amount to misconduct for unemployment insurance purposes. Since the claimant was not on notice that his tardiness on January 21, 2022 would result in the termination of his employment, we find that his reporting to work late does not constitute misconduct under the Labor Law. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective January 22, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to January 22, 2022

cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER